No. 16,033

United States Court of Appeals

For the Ninth Circuit

TRADEWIND TRANSPORTATION COMPANY, LIMITED, (Formerly known as Allen Tours of Hawaii, Ltd.),
Appellant,

vs.

BERNICE (TERRY) TAYLOR,
Appellee.

Appeal from the United States District Court
for the Territory of Hawaii.

REPLY BRIEF FOR APPELLANT TRADEWIND TRANSPORTATION COMPANY, LIMITED (Formerly known as Allen Tours of Hawaii, Ltd.).

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INTRODUCTION.

Appellant, in this reply brief, will refrain from repeating the arguments heretofore set forth in its opening brief. Appellant will deal briefly with the new points which have been raised by appellee and certain factual allegations in appellee's brief which seem in need of correction or amplification.

ARGUMENT.

I. THE DISTRICT COURT ERRED IN ALLOWING OVER OBJECTION TESTIMONY OF THE SAFETY ENGINEER.

(a) The question with regard to the testimony of the safety engineer is not whether the District Court abused its discretion in ruling with regard to the qualifications of the witness as an expert but rather whether assuming the qualification of this witness as an expert the Court erred in allowing him to testify as to his opinion of safety.

Appellee seeks to justify the testimony of the safety engineer upon the basis of facts not appearing of record in this case (Appellee's brief, pp. 5 and 6). Appellee states that at the pretrial conference it was brought to the attention of the Court that the temple steps had been altered after the accident by the application of abrasive strips. Since the appellee has chosen to go off the record, in order to be fair in so doing, there should have been a complete disclosure of what occurred at the pretrial conference. This was not done.

At the pretrial conference held on November 5, 1957 (R. 67) it was brought to the attention of the Court that shortly before the pretrial conference defendant Soto Mission had placed abrasive strips on its temple steps. The Court was also made aware of the decision of the Supreme Court of the Territory of Hawaii in the case of *Pow Kee v. Wilder S.S. Co.,* 9 Haw. 57, 60 (1893) wherein the Supreme Court of Hawaii adopted the holding of the United States Supreme Court in *Columbia & P.S.R. Co. v. Hawthorne,* 144 U.S. 202, 36 L.Ed. 405, to the effect that the evidence of changes made in premises after an accident are inadmissible as evidence of negligence since the taking

of such precautions against the future is not to be construed as an admission of responsibility for the past and has no legitimate tendency to prove that the defendant had been negligent before the accident happened.

It is interesting to note further that the appellant on November 5, 1957, the date of the pretrial conference, and the day before the trial (R. 67) amended her complaint by striking the allegation that the steps in question had been improperly chipped and substituted therefore an allegation that the steps "had not been safeguarded with abrasive strips" (R. 4).

Appellee is correct (Appellee's brief p. 6) when she states that the Court was reluctant to allow the jury to view the premises as prejudicial error would have resulted if the change of conditions were shown. It was this belief of prejudicial error on the part of the Court which led the Court to remark that a view of the premises "might also cause a situation where the work to date had been in vain" (R. 246, Appellee's brief p. 6). It is difficult to conceive how this situation would have any bearing on the admissibility of testimony of the safety engineer.

In arguing the question (Appellee's brief pp. 4 through 10) as to the propriety of the testimony of the safety engineer, appellee sets forth many cases and quotes from cases and texts. A careful examination of the authorities, save and except those set forth at p. 7 of appellee's brief, will indicate that these authorities stand simply for the proposition that it is largely within the discretion of the trial court to de-

termine whether a witness has such qualifications and knowledge so as to allow him to testify as an expert and give his opinion on certain matters. For example, in the case of *Turner v. American Security & T. Co.,* 213 U.S. 257, 53 L.Ed. 788, a quotation from which is found at page 9 of appellee's brief, the sole material issue applicable to the case at bar was whether in a case involving a Will contest, it was error to allow a lay witness who had had an adequate opportunity to observe the speech and other conduct of the testator whose soundness or unsoundness of mind was at issue, to state his opinion upon the issue of mental capacity. In other words, there was no question but that the type of evidence to be elicited from this witness was proper, the only question being whether the trial court properly exercised its discretion with respect to the *qualifications* of the witness to give his opinion in this respect.

With the exceptions as noted, all of the appellee's cases deal with the discretion of the trial court with respect to the qualifications of a witness as an expert rather than the type of testimony that the witness may give after he has been qualified as an expert.

Appellant is not complaining of the action of the District Court in its ruling with regard to the *qualifications* of the witness Ebert. The errors urged by appellant are the rulings of the District Court with respect to the *subject matter* of this witness' testimony.

(b) The authorities relied upon by appellee sustain the appellant's position that the testimony of the safety engineer was improperly admitted.

Appellee cites four cases on page 7 of her brief. Appellee states that in those four cases expert testimony was allowed to show the condition of stairways. Examination of those cases will show that each of them support the position taken by appellant.

In *Goldstein v. United Amusement Corp.,* 86 N.H. 402, 169 Atl. 587 (1933), the Court held that it was not error to allow an expert to testify that the construction of stairs was not proper and supplemented his opinion with an enumeration of specific defects.

In the case of *McCrory's Stores Corp. v. Murphy,* 164 S.W.2d 735 (Tex. App. 1942), an architect was allowed to testify as an expert. He examined and measured the steps and stated they were made of terrazzo and that this substance was in common use in such structures. He said the steps had been used 20 to 25 years and showed signs of wear and that they did not incorporate many of the safety measures considered necessary in more modern structures.

A reading of this decision will indicate that there was no question of the propriety of this testimony nor any indication that it had even been objetced to. The only contention to be made on appeal by the appellant in that case was that the verdict was so overwhelmingly contrary to the evidence that it should be set aside.

In *McStay v. Citizens' Nat. Trust & Sav. Bank,* 5 Cal.App.2d 595, 43 P.2d 560 (1935), the appellant

complained of the trial court's ruling in admitting the testimony of two experts with respect to the construction and safety of the steps and platform. An architect was allowed over objection to testify that the steps were not scientifically constructed in that first they were unnecessary in the place where they were located, and secondly, that they had no guard or handrail for people to hold on to.

In addition, a safety engineer was permitted, over objection, to give his opinion as to whether or not the steps, as he saw them, were safe or unsafe.

The Court (43 P.2d at p. 563) stated that it was proper to allow testimony concerning the scientific or customary construction of the steps in a hotel building since it was not a matter of common knowledge. The Court stated that in view of the answer of the safety engineer considered in connection with other proofs in the case, they deemed *the error* in overruling the objection to the question to him harmless.

The remaining case cited by the appellee on page 7 of her brief is *Allison v. Doerflinger Co.,* 208 Wis. 206, 242 N.W. 558, 560 (1932). In that case the defendant appealed from an order granting the plaintiff a new trial. It appeared that the plaintiff had been injured in a fall on the defendant's steps. The plaintiff brought action for damages based upon a violation by the defendant of the "Safe Place Statute" of Wisconsin and a violation of orders of the Industrial Commission.

The lower court had excluded expert testimony as to whether the steps had reasonable and adequate safety devices and as to whether they (the steps) conformed to the requirements of the Industrial Commission's rules and regulations that had been offered in evidence. The Appellate Court affirmed the order granting a new trial and by way of dicta stated that such testimony should have been allowed.

The aforementioned case standing alone might have been considered as authority for the appellee's position had the claim of the plaintiff been based upon the general law of negligence rather than a statutory action for violation of a State law and specific orders of the Industrial Commission.

In *Bent v. Jonet,* 213 N.W. 635, 252 N.W. 290, 293 (1934), the Supreme Court of Wisconsin in referring to the case of *Allison v. Doerflinger Co.,* supra, pointed out that the basis of the decision in the earlier case allowing expert testimony as to the safety of the structure involved was that the orders of the Industrial Commission had been introduced in evidence and it was, therefore, proper to offer expert testimony to explain these orders and to explain whether or not the situation as it existed, complied with the law and the orders which had been introduced in evidence. The Court (252 N.W. at p. 293) rejected the contention that the case of *Allison v. Doerflinger Co.,* supra, laid down any rule that expert testimony would be receivable if the matter related to skill or science even though the ultimate question before the jury was passed upon.

In the case at bar there was no evidence of any law, rule or regulation applicable to the steps at the Soto Mission Temple on June 13, 1956. This fact was recognized by the Court (R. 285-287).

From the foregoing it is apparent that the appellant has failed to cite any specific authority to the effect that a safety expert may testify as to an ultimate question of fact to be determined by the jury. It would appear that there is no such authority and that the law is well-established to the contrary.

II. EVIDENCE RELIED UPON BY APPELLEE OF THE EXISTENCE OF A DANGEROUS CONDITION IS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH SUCH A CONDITION.

The evidence relied upon by appellee supports a finding that there was a dangerous condition at the Soto Mission Temple on June 13, 1956, is set forth verbatim on pages 11 through 14 of appellee's brief. Summarized, this evidence consists of testimony of the safety engineer, defendant Soto Mission's expert witness, the architect Mr. Lester, and testimony of the tour driver.

A major portion of the testimony of Mr. Ebert (R. 135, 155 and 156) relied upon by appellee was objected to by appellant and is found in Specifications of Error No. 2 (appellant's opening brief, p. 14) and No. 6 (appellant's opening brief, p. 18). If this testimony was erroneously admitted, it follows that it must have been prejudicial since appellee herself relies upon it as a basis for the finding of the existence of a hazardous condition.

Assuming, for the sake of argument, that the District Court did not err in admitting this testimony of the safety engineer, nevertheless his testimony cannot form the basis of a finding of a hazardous condition. This expert himself testified: "Q. (by Mr. Knight): I see, so that was an ultimate—and, as you say, these are a high degree of professional standards of safety? A. Absolutely." (R. 159-160). "Q. (by Mr. Knight): Mr. Ebert, would a reasonably prudent person as opposed to a safety engineer be aware of any safety hazard that would be present in June of 1956? A. Would be aware of it? Mr. Ingram. I object to the question. The Court. Objection overruled. A. I don't think so." (R. 156-157).

In other words, it is apparent that the standards testified to by Mr. Ebert were optimum standards of the highest degree as established by safety engineers.

The testimony of the architect relied upon by appellee (appellee's brief, p. 14) does not assist her case. The architect merely acknowledged on cross-examination that the steps could have been further improved. The fact that the steps could have been better than they were is not material unless it is first established that they were substandard and that additions were required to bring them up to recognized standards. *Pow Kee v. Wilder S.S. Co.,* 9 Hawaii 57, states at page 59:

> ". . . In this particular case, for instance, it may not have been negligence to have continued the use of a wooden warehouse built some years ago under circumstances which made it proper to erect such a building. A person is not obliged to

pull down an expensive building and erect another whenever he can erect a better one. . . ."

III. APPELLEE'S CONTENTION THAT THERE WAS EVIDENCE OF APPELLANT'S KNOWLEDGE OF A DEFECTIVE CONDITION IS WITHOUT BASIS IN LAW OR IN FACT.

Appellee has set forth the rule of law that the knowledge of an employee gained within the course and scope of the employment is imputed to his principal (Appellee's brief, p. 17). We accept this statement of law as being correct but there should be added to it the qualification that the knowledge must be with regard to a subject matter connected with the employment.

Appellee has cited at length from the record (appellee's brief 15 through 17) portions of the testimony of appellant's former employee Pagay dealing with his having at one time seen a man slip. From this testimony appellee draws the unwarranted conclusion that the occasion on which appellant's former employee saw a man slip must have related to the period during which he was in appellant's employ. It is submitted that the burden of proof was on appellee to prove this point and counsel for the appellee so acknowledged (R. 250) (Appellant's opening brief p. 44).

In quoting from the Record the testimony of appellant's ex-employee, appellee ignores a pertinent part of the testimony referring to the time when this occurrence is alleged to have occurred. In the cross-examination the tour driver testified as follows:

"Q. (By Mr. Fleming): Now, then, you testified, I believe, as to seeing a driver slip, is that right? [268]

A. Correct.

Q. Do you know his name?

A. No, I don't, sir.

Q. Do you know when it was?

A. Well, I can't say what time it was, sir, and what date.

Q. Now, isn't it a fact that he is the only man you ever saw slip on these steps?

A. That is the only man, yes.

Q. Did you see a woman?

A. I seen a woman, not on the steps but on the grass."

. . .

"Q. (By Mr. Fleming): You have been up the steps in the temple there how many times would you estimate from the period prior to June 13, 1956?

A. Before that, you mean to say?

Q. Yes.

A. I can't count. Many times.

Q. Many many times?

A. Yes, even before I was a driver I still went up there to show people.

Q. You are still going up now?

A. Still going." (R. 177 and 180-181).

Appellee relies upon the case of *Teche Lines v. Keyes,* 193 S. 620, 187 Miss. 780 (1940) (appellee's brief, p. 17) as being in point and supporting the position taken by the appellee. It is submitted that this case is not authority for the position taken by appellee and is clearly distinguishable. That case

arose out of an accident to a passenger of a common carrier while the common carrier was in transit.

The Court in the *Teche* case held that a common carrier was under the highest degree of care with regard to the carriage of passengers along its route and that by reason thereof practical conduct of its business required that reports be made by its driver with respect to dangerous places occurring along the route (193 S. 620 at 622). In the *Teche* case there was no dispute as to the existence of a dangerous condition and actual knowledge and notice of such condition by drivers other than the one involved in the accident whereas in this case there is no evidence that anyone, including the witness Pagay had any knowledge of any hazardous condition. The very existence of a hazardous condition was in dispute.

The Court asked the witness Pagay if he had ever had any experience of an unusual nature on the steps himself to which he replied: "No, sir." Appellee's counsel asked him what his experience had been with regard to these steps prior to June 13, 1956, to which he replied: "No experience at all." (R. 174).

Thus, appellee is arguing that even though there was nothing to give notice of a hazardous condition to appellant's former employee, the tour driver, nevertheless since an expert might later determine that there were in fact hazards, that subsequent determination would relate back to give notice to the one to whom the defects were not and should not have been apparent. It is submitted the argument is fallacious

and that there is no evidence in the case at bar of the notice of a hazardous condition to anyone.

IV. THE CONTENTION THAT APPELLANT OWED APPELLEE A DUTY TO NOTIFY HER OF THE CONDITION OF THE MISSION STEPS IS WITHOUT BASIS WHEN CONSIDERED IN RELATION TO THE FACTS IN THIS CASE.

Heretofore appellee has not contended that appellant is a common carrier. The facts indicate that appellant was a private carrier and that appellee paid a reduced fare as a member of a private tour party, which tour was not open to the public (R. 295). This is not the case where a common carrier has adopted the premises of another (e.g. depot facilities furnished pursuant to a contract with a third party) to fulfill his contract of carriage nor is it contended that appellant had a non-delegable duty to provide means of ingress and egress into the Soto Temple as is the case of common carriers which adopt the depots with facilities of another carrier in execution of its contractual duties. (See 41 ALR 2d 1286, at p. 1290).

At page 20 of appellee's brief, appellee cites two cases for the proposition that appellant owed a duty to appellee to notify appellee of the defect in the Mission steps. In *McBroom v. S. E. Greyhound Lines,* 29 Tenn.App. 13, 193 S.W. 2d 92 (1945), plaintiff passenger of a common carrier had been directed to a cafe for an evening rest stop and defendant's bus driver had subsequently turned out the bus lights resulting in plaintiff's fall when she returned to the

bus in the dark. This was a case of active negligence on the part of defendant's driver who was held.

Likewise in the case of *Watts v. Colonial Stage Lines,* 45 Ga. App. 96, 163 S.E. 523 (1932) (cited in appellee's brief page 20) liability for injuries to a passenger was predicated upon active negligence. The defendant's driver, in directing a passenger to a restroom, wrongfully sent him down an unlighted stairway leading to a cellar.

> "The plaintiff had the right to assume that he was not being directed into a mantrap or pitfall. . . . " (163 S.E. 523 at 524).

Horelick v. Pennsylvania R. Co., 13 N.J. 349, 99 A. 2d, 652 (1953), cited by appellee at page 20 of her brief, involved a passenger's fall on an icy platform at the Washington railroad station which was owned and controlled by the Washington Terminal Company and used as the exclusive means of ingress and egress to its trains by the Pennsylvania Railroad Company. The Court held that the duty of the railroad was to provide a safe means of exit and at page 655 this duty was held to be non-delegable.

Appellee relies on *Hotels El Rancho, Inc. v. Pray,* 64 Nev. 591, 187 P. 2d 568 (1947) (appellee's brief, p. 21). The factual situation in that case is so clearly distinguishable as to make the analogy an absurdity. In the *Pray* case defendant hotel had laid out a cross-county horse race course over the land of a third party and directly over what defendant's agents knew (and had witnessed) to be a recent target area for an aerial bombing and rocket demonstration by

the United States Navy. No one else used the property after the demonstration. The Supreme Court of Nevada stated that the condition of the race course in question constituted an extraordinary danger, artificially created, amounting to a pitfall or mantrap. Such is not the fact in the case at bar.

Appellee cites *Zerner v. Cohen,* 87 N.Y.S. 2d 342, 275 A.D. 702 (1949) for the proposition that it was negligence for a person to fail to notify another of a defective condition in a cellar stairway (appellee's brief, p. 23). The half page per curiam decision, although terse, states that the action was predicated on the alleged negligence of Hannah Cohen in "directing" decedent to the cellar door and broom closet under inadequate lighting conditions without warning defendant of the condition (trap) behind the door.

Collins v. Hazel Lumber Co., 54 Wash. 524, 103 Pac. 798 (1908) was a case in which the defendant had felled two trees which blocked a public highway. Defendant caused a detour to be constructed around this road block, which detour was located on the land of a third party. Defendant had not received permission of the landowner to construct the detour on his land.

Plaintiff's husband was killed when his wagon overturned when traveling on the detour. There was evidence that the detour had been improperly maintained by the defendant.

The Court correctly held that the defendant under the circumstances, owed a duty to plaintiff to provide a means of transportation around the road block

and that the defendant could not escape liability by claiming that the detour was on land owned by a third party.

Appellee cites this for the proposition that appellant cannot escape liability by reason of the fact that appellee's injury occurred on property belonging to a third person (appellee's brief, p. 24). The general proposition is correct, that is, a wrongdoer cannot escape liability for his wrongful acts merely because they are committed on the land of a third party and the cited case is a good illustration of this rule since the defendant in that case undertook certain responsibility, to-wit: the maintenance of the detour. There was active negligence with respect to the defendant's undertakings and he should have been held liable. The rule, however, is not applicable to the facts in the case at bar where appellant had no right to occupancy, possession or control of the Temple premises greater than any other member of the general public.

Appellee has not cited any authority which when applied to the facts in this case hold that appellant owed a duty to appellee other than to refrain from active negligence and to warn appellee of any man-traps or pitfalls known to appellant or its authorized agents or servants.

CONCLUSION.

Appellee failed to introduce sufficient, competent evidence to form a basis for a finding of liability against appellee. Appellee had the burden of proving

her case against appellant and failed to sustain this burden.

Appellee now seeks to justify the judgment on the verdict entered against appellee upon the basis of interferences not supported by the record and upon legal authority inapplicable to the factual situation here presented. Appellee has not cited any competent authority to sustain her position. To allow the judgment against appellant to stand would be tantamount to an unwarranted extension of liability into a new field.

Here there is presented a case that never should have been submitted to the jury and the fact that the jury may have decided against the appellant on the basis of erroneously admitted evidence should not preclude the Court from taking appropriate action to rectify and correct this injustice by reversing the judgment of the lower court.

Dated, Honolulu, T. H.,
October 14, 1958.

Respectfully submitted,

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